APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

9 January 2003

[316 F.3d 886]

Christine A. CUMMINGS; Janet Taylor Darvas; Richard K. Dehart; Christopher Garbani; Patricia A. McCumsey; Daniel Nowalis; and Claudia Stewart, Plaintiffs-Appellees/Cross-Appellants,

v.

Kathleen CONNELL, Controller, State of California; Marty Morgenstern, Director, California Department of Personnel Administration, Defendants/Cross-Appellees,

and

California State Employees Association, Local 1000, Service Employees International Union, AFL-CIO-CLC, Defendant-Appellant/Cross-Appellee.

Nos. 01-16735, 01-16819, 01-17445, 01-17450.

United States Court of Appeals, Ninth Circuit

Argued and Submitted Nov. 4, 2002.
Filed Jan. 9, 2003.

* * * *

[888]W. James Young, National Right to Work Legal Defense Foundation, Inc., Springfield, VA, for the plaintiffs-appellees/ cross-appellants.

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Appeal from the United States District Court for the Eastern District of California; William B. Shubb, District Judge, Presiding. D.C. No. CV-99-02176-WBS.

[889]Before HAWKINS, GRABER, and TALLMAN, Circuit Judges.

OPINION

MICHAEL DALY HAWKINS, Circuit Judge.

It is settled law that a union may charge nonunion employees certain fees to pay for their "fair share" of the union's cost of negotiating and administering a collective bargaining agreement. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). In *Chicago Teachers Union v. Hudson,* 475 U.S. 292, 310, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), the Supreme Court established certain safeguards in connection with the collection of such fees, including "an adequate explanation of the basis for the fee." This appeal involves the adequacy of the June 1999 "*Hudson* notice" prepared by the California State Employees Association (the "Union").

The Union is the exclusive representative for nine bargaining units of California state employees. After several years without collective bargaining agreements ("CBAs") in place, in March 1999, the Union entered into CBAs allowing

the state employer to deduct "fair share" fees from plaintiffs' paychecks and forward the funds to the Union. In April 1999, the Union sent a notice to nonmembers informing them of the "fair share" deductions. The state, through its controller (defendant Kathleen Connell), commenced making the deductions the same month. It is undisputed that the April notice was not intended to be a *Hudson* notice.

In June 1999, the Union sent a second notice that purported to comply with *Hudson*. The notice set the "fair share" fee (95% of union dues) and provided an opportunity for the nonunion employees (also called "fee payers") to object to paying for activities not germane to collective bargaining, automatically reducing the fee to 82% of union dues. This notice additionally explained how a fee payer could challenge the fee calculation by requesting arbitration. These procedures are not challenged here; rather, the dispute is over whether the notice included sufficient information for fee payers to decide to object and challenge the fee calculation.

The June 1999 notice included a report on the Union's 1998 expenditures and divided them into three categories: (1) those chargeable to fee payers, (2) those not chargeable to fee payers, and (3) those partially chargeable to fee payers. The report further broke down the expenditures into approximately 50 subcategories. The notice, however, did not contain a copy of the complete auditor's report, but instead informed fee payers that:

> The Report itemizes and describes the major categories of expenditures by the [Union]. The amounts attributed to these categories of expenditures are taken from an independent audit and supporting documentation of [the Union's] 1998 financial records contained in the Financial

> Statements prepared by Gibson and Company, Inc., a certified public accounting firm.

The notice also informed fee payers that a copy of the audit would be provided upon request.

Plaintiffs filed their complaint in November 1999, asserting that the April and June notices were constitutionally inadequate under *Hudson* because they failed to include a copy of the auditor's report. In December, the district court granted the plaintiffs' motion to certify a class action. In January 2000, the Union mailed a copy of the audit to all fee payers. This notice was still found to be deficient, however, because it did not extend the time for fee payers to object.

Still later in January 2000, the Union again tried to fulfill the plaintiffs' demands **[890]**and sent a new amended notice that cross-referenced both the June 1999 notice and the auditor's report and extended the period for nonmembers to challenge the fee calculation. Although the district court noted that the Union had made a good faith effort to correct defects in the earlier notices and that the court itself may have caused the Union to use the "piecemeal" approach of correcting the defects, the court ultimately concluded that these notices still did not comply with *Hudson* because too much time had elapsed for the cross-references to be sufficient.

Finally, in May 2000, the Union sent another "integrated" notice that included all the information from the previous notices, reopened the objection/challenge period, and accommodated an additional request by plaintiffs for an "allocation audit." It is undisputed that this notice complied with *Hudson*. The Union's calculation was then challenged through arbitration, and the arbitrator set the fee for objecting fee payers at 73% of dues for the period from April 1999 to

June 2000. Any fee payer who had objected to any of the notices from April 1999 to May 2000 then received a refund of the nonchargeable amount of the fee, with interest, retroactive to April 1999.

In May 2001, the district court ruled on cross-motions for summary judgment. Finding that all notices except the May 2000 notice were deficient under *Hudson,* the district court ordered the Union to refund the nonchargeable portion of the fee to all fee payers, including those who did not object to any of the notices. The court granted the Union's motion for summary judgment on the plaintiffs' challenge to two expenditures charged to fee payers. The court also rejected the plaintiffs' request for a permanent injunction and found they lacked standing to challenge an indemnification clause in the CBAs.

Plaintiffs sought more than $200,000 in attorneys' fees and costs. Because the plaintiffs were only partially successful in their litigation, the court reduced the number of hours for which they reasonably could recover. The court ultimately awarded only about $67,000 in fees, but awarded nearly full costs of $32,711.03. This appeal and cross-appeal followed.

I. The June 1999 Hudson Notice

A. *The Union's Appeal*

The Union appeals the district court's determination that its first *Hudson* notice was deficient because it failed to include a copy of the auditor's report. The Union contends that the concerns of *Hudson* were satisfied by its notice, which included a detailed breakdown of expenses by category, informed the nonmembers that the figures had been audited, and offered to provide a copy of the report upon request. We review de novo

the district court's grant of summary judgment on the sufficiency of the *Hudson* notice. *See Knight v. Kenai Peninsula Borough Sch. Dist.,* 131 F.3d 807, 812 (9th Cir.1997).

We find that the Union's 1999 notice did not satisfy the dictates of *Hudson*. Although it informed nonmembers that the figures in the notice were derived from an audited statement, it did not include any "independent verification" of this fact. *Hudson* did not say merely that the expenditures must be audited, but that "adequate disclosure surely would include ... *verification* by an independent auditor." 475 U.S. at 307 n. 18, 106 S.Ct. 1066 (emphasis added). Although not expressly addressing the question before us, we recently mirrored this requirement from *Hudson* and explained that, although a formal audit is not always required, "the union must provide a statement of its chargeable and nonchargeable expenses, together with an independent verification **[891]**that the expenses were actually incurred." *Harik v. Cal. Teachers Ass'n,* 298 F.3d 863, 866 (9th Cir. 2002).

The Union argues that this circuit previously suggested that *Hudson* requires the union only to communicate that the figures have been audited, relying on our decision in *Knight,* 131 F.3d at 812-13. In *Knight,* the union provided nonmember employees with an unaudited financial report that was generated from two audited reports. *Id.* at 813. With the help of appellate briefing, the court was able to determine that the unaudited figures were indeed based on two sets of audited figures, but found that the notice was insufficient because nonmembers "were not provided with sufficient direction to be able to determine that [the union's] expenditures were audited." *Id.*

We do not read *Knight* to say that *all* Hudson requires is an indication that reports have been audited, as the Union argues; rather, as the Union admits in its brief, the case is silent as to whether the notice must contain the auditor's report or some other type of verification. Read in context, we believe *Knight* to hold that *even if* that were all that *Hudson* required, the notice in that case was still insufficient because the fee payers could not even have determined that, at a minimum, the expenditures had been audited. *See id.* We therefore do not find our recent pronouncement in *Harik* regarding the need for inclusion of independent verification in the notice to be inconsistent with *Knight.*

Other circuits have required more than a simple statement that the figures provided have been audited. As the Tenth Circuit recently observed, the purpose of verification by an independent auditor is to give nonmembers assurance that the reviewed books really reflect the transactions that occurred and to give them information to make their own judgments about whether to object or to challenge the Union's calculations. *Wessel v. City of Albuquerque,* 299 F.3d 1186, 1193-94 (10th Cir. 2002). The court went on to hold that, "[w]ithout the auditor's reports, nonmembers could not have sufficient information to make such a determination. A simple statement that the Union's expenses were audited conveys minimal, if any, assistance to nonmembers attempting to decide whether to challenge the Union's determination." *Id.* at 1194. The Sixth Circuit also appears to require that the notice include some verification or certification by the independent auditor. *See, e.g., Damiano v. Matish,* 830 F.2d 1363, 1370 (6th Cir.1987) ("*Hudson* also mandates the verification of the union's calculations ... by means of an independent auditor. Moreover, the union must provide this information to each employee,

without formal request ...." (citations omitted)); *Tierney v. City of Toledo,* 824 F.2d 1497, 1504 (6th Cir.1987) ("[A]ll nonmembers must receive an adequate accounting, certified by an independent auditor and setting forth the major categories of the union's budgeted expenses....").

The Union's June 1999 notice essentially required the plaintiffs either to accept that the expenditures were indeed audited or to go to the trouble of requesting a copy of the audit report to verify the Union's summary. The purpose of the *Hudson* notice is to allow nonmembers to "gauge the propriety of the union's fee," 475 U.S. at 306, 106 S.Ct. 1066, and the Court clearly contemplated that such a determination would be based on information contained in that notice, *see id.* at 307 n. 18, 106 S.Ct. 1066. In light of the purposes of a *Hudson* notice, the language in *Hudson* itself, and the caselaw from this and other circuits, we agree with the district court that the representation in the June 1999 notice that the figures had been audited was not sufficient under *Hudson.*

[892]In so holding, however, we do not mean to suggest that a full copy of the audit must always be included in the notice. Indeed, as we recently held, a full-blown audit is not always required under *Hudson. Harik,* 298 F.3d at 869. In a case such as this one, in which the Union contends that the relevant figures were simply lifted from an audited financial statement, it should suffice for the notice to include a certification from the independent auditor that the summarized figures have indeed been audited and have been correctly reproduced from the audited report.[1]

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[1] If a union must perform some additional calculations or adjustments in order to provide the requisite notice to nonmembers

(continued...)

B. *The Plaintiffs' Cross Appeal*

On cross-appeal, the plaintiffs contend that a *Hudson* notice should not only include some independent verification of expenditures, but that the notice must include an "allocation audit." In other words, the auditors should verify not only that money has been spent in the way the Union claims it has, but also that the Union has properly allocated its expenditures between chargeable and nonchargeable expenses.

Plaintiffs rely principally on a district court decision, *Mitchell v. Los Angeles Unified School Dist.,* 739 F.Supp. 511, 514-15 (C.D.Cal.1990), where the court said:

> [M]ere verification of total expenditures by category would be meaningless, inasmuch as it plays no role in the computation of the agency fee. The critical data is the ratio between chargeable vs. nonchargeable expenses, because it is this ratio that is used to compute the percentage of union dues properly assessed as an agency fee. Thus, the Court concludes that the independent verification requirement must apply to the allocation of chargeable and nonchargeable expenditures in a union's major expense categories.

Mitchell, however, was decided before a number of Ninth Circuit cases that discuss *Hudson* and its requirements. Although no opinion in this circuit has specifically addressed the issue of an allocation audit, language in a number of our decisions seems to foreclose plaintiffs' argument, thereby

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[1] (...continued)
(such as adjusting a national union's breakdown of financial information to a local level, as in *Knight,* 131 F.3d at 813), then the certification may need to be more detailed and confirm that the local union has performed the mathematical adjustments correctly.

rejecting the requirements of *Mitchell*. For example, in the recent *Harik* case, we held that, "while a formal audit is not required, the union must provide a statement of its chargeable and nonchargeable expenses, together with an independent verification *that the expenses were actually incurred*." 298 F.3d at 866 (emphasis added). This passage certainly indicates that, although the Union must provide a breakdown between chargeable and nonchargeable expenses, the audit does not verify that the allocation is correct, but that the expenses were indeed spent the way the Union claims.

Further confirming this interpretation, *Harik* goes on to quote from an earlier decision in which we wrote that "[w]hat is required is a real independent verification of the financial data in question to make sure that expenditures are being made the way the union says they are." *Id.* at 869 (quoting *Prescott v. County of El Dorado ("Prescott I")*, 177 F.3d 1102, 1107 (9th Cir.1999)). Moreover, in *Prescott I*, we gave a concrete example of the role of independent verification, which further confirms that the auditor's role is more limited than plaintiffs urge: "[W]as an **[893]**amount supposedly directed to 'x' for negotiation expenses really dispersed to him, or did it go to 'y', who is union lobbyist?" 177 F.3d at 1107.

In addition, a number of other circuits have expressly rejected the notion that *Hudson* requires an allocation audit. In *Andrews v. Education Association of Cheshire*, 829 F.2d 335, 340 (2d Cir.1987), the Second Circuit held that *Hudson* does not require the auditor to verify the proper categorization of expenditures as chargeable or nonchargeable, but merely "to ensure that the expenditures which the union claims it made for certain expenses were actually made for those expenses." The court noted that a different interpretation "would have the auditor making a legal, not an accounting, decision regarding

the appropriateness of the allocation of expenses." *Id.; accord Gwirtz v. Ohio Educ. Ass'n,* 887 F.2d 678, 682 n. 3 (6th Cir.1989); *Ping v. Nat'l Educ. Ass'n,* 870 F.2d 1369, 1374 (7th Cir. 1989).

The Fourth Circuit also explained that it would make little sense for the auditor to undertake verifying the allocation when the union would have to justify its allocation when challenged by a fee payer regardless of the auditor's opinion:

> The appellants' plea [for an allocation audit] is tantamount to requiring the auditor to give a second legal opinion on whether categories were properly related to collective bargaining. This would require legal interpretations of several complex Supreme Court decisions by persons not professionally qualified to give them.... The Union's position is just as well reviewed by the employees. Moreover, if the employees object, the Union will be called upon to justify further its position.

Dashiell v. Montgomery County, 925 F.2d 750, 756 (4th Cir.1991).

As noted above, we believe the plaintiffs' claim has already been foreclosed by various decisions in this circuit. To the extent any doubt remains, we expressly join the Second, Fourth, Sixth and Seventh Circuits and reject plaintiffs' claim that *Hudson* requires an allocation audit.

II. Remedy

To remedy the inadequacies of the initial June 1999 notice, the district court ordered restitution of the nonchargeable portion of the fee to all class members, whether or not the nonmember employee had objected to any of the notices. The Union contends this remedy goes too far; the plaintiffs contend

it does not go far enough. We review de novo a district court's legal conclusion that a particular remedy is available. *EEOC v. Wal-Mart Stores, Inc.*, 156 F.3d 989, 992 (9th Cir.1998).

The plaintiffs' claim is easily disposed of, as it is contrary to clearly established law in this circuit. *See Prescott I,* 177 F.3d at 1109-10 (rejecting argument that the proper remedy should be a refund of *all* fees collected prior to compliance with *Hudson*). In an attempt to evade the holding of *Prescott I,* the plaintiffs argue that *Prescott I* is inconsistent with this circuit's earlier decision in *Knight,* in which the court noted that the union had not complied with *Hudson* and "was not entitled to the fees that it collected." 131 F.3d at 815. Plaintiffs suggest we should simply ignore *Prescott I* and apply *Knight.* However, it is not the practice of this circuit to simply ignore an inconsistency, but rather to take the case en banc to resolve a conflict. *See* Fed. R.App. P. 35(a)(1).

More to the point here, however, the cases are consistent. *Prescott I* expressly addressed the quoted phrase in *Knight* and explained that, although *Knight* said the union was not entitled to the full amount of fees it collected, *Knight* did *not* say the union could not receive any fees **[894]**whatsoever. 177 F.3d at 1109. In support of its interpretation of *Knight*, *Prescott I* also pointed out that, instead of simply ordering complete restitution, the court in *Knight* remanded, leaving " 'the measure of damages ... for the district court to determine in the first instance.' " *Id.* (quoting *Knight,* 131 F.3d at 815). The district court thus properly applied *Prescott I* and rejected the plaintiffs' claim for full restitution.

We agree with the Union, however, that the district court went too far in ordering partial restitution to all class members. Ordinarily, if there is a proper *Hudson* notice, the employee has

the burden to object to paying the full nonmember fee, and only then is entitled to a refund of the nonchargeable portion of the fee. *See Hudson,* 475 U.S. at 306 n. 16, 106 S.Ct. 1066 ("The nonmember's 'burden' is simply the obligation to make his objection known."); *Abood,* 431 U.S. at 238, 97 S.Ct. 1782 ("'dissent is not to be presumed'") (quoting *Int'l Ass'n of Machinists v. Street,* 367 U.S. 740, 774, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961)); *see also Mitchell v. L.A. Unified Sch. Dist.,* 963 F.2d 258, 262-63 (9th Cir.1992) (rejecting argument that because only nonmembers were involved in suit, they should be presumed to object to paying full fair share fee).

In this case, it is undisputed that the Union's May 2000 notice complied with *Hudson.* If a nonmember objected to *any* of the notices between April 1999 and May 2000, the Union refunded the nonchargeable portion of the fee, with interest, retroactive to the first paycheck deduction. Accordingly, the Union argues that it was improper for the district court to order it to refund the nonchargeable portion to all class members, including those who did not affirmatively object to even the proper *Hudson* notice in May 2000.

Plaintiffs contend that the Union cannot "unring the bell" by providing a correct notice thirteen months after it began deducting fees and that a refund of the nonchargeable portion is the minimum permitted by our caselaw. *See Knight,* 131 F.3d at 815; *Prescott I,* 177 F.3d at 1109. However, in neither *Knight* nor *Prescott I* did the union ever issue a corrected *Hudson* notice with a new opportunity for nonmembers to object, and thus they are inapposite to this situation.

We do, however, find it helpful to consider cases involving private-sector unions that must issue notices similar to those required by *Hudson* pursuant to *Communications Workers of*

America v. Beck, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988). If a *Beck* notice is defective, the union must send a corrected notice, and issue retroactive refunds, with interest, to fee payers *who object to the corrected notice. Rochester Mfg. Co.,* 323 N.L.R.B. 260, 262, 1997 WL 113885 (1997), *aff'd mem. Cecil v. NLRB,* 194 F.3d 1311 (6th Cir.1999), *cert. denied,* 529 U.S. 1066, 120 S.Ct. 1671, 146 L.Ed.2d 481 (2000); *see also United Food & Commercial Workers Union, Local 1036 v. NLRB,* 249 F.3d 1115, 1120 (9th Cir.2001), *reinstated in pertinent part,* 307 F.3d 760, 774 n. 21 (9th Cir.2002) (en banc) (remedy for improper "welcoming letter" was to send corrected letter to those who received defective notice; refunds should be made only to those who receive corrected notice and object).[2]

[895]In this case, the district court found that the plaintiffs had no burden to object because the deductions were made "in the absence of a reasonably prompt notice that satisfied the requirements of *Hudson.*" It is true that a good deal of time elapsed between the initial paycheck deduction and the proper *Hudson* notice. But this does not mean the Union was intentionally dragging its feet. It issued a notice in June 1999 that it believed complied with *Hudson.* Plaintiffs filed suit in

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[2] Although not directly on point, caselaw in other circuits is also generally in harmony with this view. In a recent Tenth Circuit case, the union issued a corrected notice and refunded the nongermane fees to the plaintiffs (who had apparently all objected to the initial notice). *Wessel,* 299 F.3d at 1193, 1194. The court noted that the district court correctly awarded nominal damages to the plaintiffs for the initial incorrect notice and that plaintiffs were entitled to no further relief. *Id.* at 1194; *see also Weaver v. Univ. of Cincinnati,* 970 F.2d 1523, 1532 (6th Cir.1992) (noting that until proper *Hudson* notice is issued, employee will be allowed subsequent opportunities to object).

November, contesting the adequacy of that notice. The Union issued two more notices in January 2000 in an attempt to comply with *Hudson,* even though the district court eventually found these lacking as well. The district court's order even acknowledges that the Union had made good faith attempts to correct the notice and that the district court itself may have created the "piecemeal" approach to the notices.

The purpose of the *Hudson* notice is to provide fee payers with adequate information so that they may decide whether to object or to challenge the Union's calculation. *See Hudson,* 475 U.S. at 306, 106 S.Ct. 1066. In this case, the nonmembers all eventually received notices with sufficient information under *Hudson,* and a renewed opportunity to object and receive their money back with interest. We fail to see how plaintiffs suffered any compensable harm (aside from nominal damages) from the initial defective notice. On these facts, we hold that the May 2000 notice was adequate to renew the burden on the plaintiffs to object, and ordering a refund to nonobjecting plaintiffs was therefore overbroad. We stress, however, that ordinarily a lapse of thirteen months before issuing an adequate *Hudson* notice would be unacceptable, but in this case we place great significance on the district court's finding that the Union was acting in good faith and on its concession that the court itself may have caused the delay in the Union's issuing the ultimately acceptable notice.

III. Class Certification

We review a district court's decision to grant or deny class certification for abuse of discretion. *Zinser v. Accufix Research Inst., Inc.,* 253 F.3d 1180, 1186 (9th Cir.), *amended* 273 F.3d 1266 (9th Cir.2001). The Union contends that the district court abused its discretion by certifying the class because the

plaintiffs are not adequate class representatives. Specifically, the Union argues that the named plaintiffs' interests are antagonistic to those of the class because the plaintiffs seek full restitution of *all* fees paid, a remedy that is "punitive insofar as it [seeks] to deprive the union of fees to which it was, doubtlessly, entitled." *Prescott I,* 177 F.3d at 1109.

The Seventh Circuit found that pursuit of such a remedy created a "potentially serious conflict of interest within the class," justifying a refusal to certify a class. *Gilpin v. Am. Fed. of State, County, and Municipal Employees,* 875 F.2d 1310, 1313 (7th Cir.1989). The court explained:

> Two distinct types of employee will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken and if possible destroy **[896]**the union; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members. The "restitution" remedy ... is consistent with--and only with--the aims of the first type of employee.... Not only would the "restitution" ... confer a windfall on the nonunion employees but it might embarrass the union financially. Yet those nonunion employees who, while not wanting to pay more (and perhaps even wanting to pay less) than their "fair share" fees, have no desire to ruin the union or impair its ability to represent them effectively might not want so punitive a remedy.

Id. The Fourth and Sixth Circuits have also upheld a denial of class certification on similar grounds. *Weaver v. Univ. of Cincinnati,* 970 F.2d 1523, 1530-31 (6th Cir.1992); *Kidwell v. Transp. Communications Int'l Union,* 946 F.2d 283, 305-06 (4th Cir.1991).

The district court recognized that this case presents concerns similar to the ones addressed in *Gilpin.* However, the court also noted that the full restitution remedy was clearly unavailable under this circuit's precedent and that the other remedies sought did not create a conflict between class members. The court also pointed out that the Union presented no evidence that an actual conflict existed among class members. The court thus determined that the conflict was too speculative at the time to prevent finding the named plaintiffs to be adequate representatives. The court, however, remained willing to reconsider and decertify the class if the plaintiffs continued to pursue the remedy or there was evidence of an actual conflict.

We believe that the district court's approach was entirely appropriate. As discussed above, the district court was correct that the "punitive" remedy of full restitution is precluded in this circuit by existing caselaw. *Prescott I,* 177 F.3d at 1109-10. Therefore, the potential conflict discussed in *Gilpin* is not truly present in this case. Although the plaintiffs may seek to change the current rule through the en banc process or by petitioning the Supreme Court, the district court correctly remained willing to reconsider and decertify the class if a conflict should develop. Class certification is not immutable, and class representative status could be withdrawn or modified if at any time the representatives could no longer protect the interests of the class. *Soc. Servs. Union, Local 535 v. County of Santa Clara,* 609 F.2d 944, 948-49 (9th Cir.1979).

Furthermore, this circuit does not favor denial of class certification on the basis of speculative conflicts. *See id.* at 948 ("Mere speculation as to conflicts that may develop at the remedy stage is insufficient to support denial of initial class certification."); *see also Blackie v. Barrack,* 524 F.2d 891, 909 (9th Cir.1975) (noting that class members might have differing interests at later stages of litigation, but that "potential conflicts" do not present a valid reason for refusing to certify a class). The Union produced no evidence that class members actually possess opposing views regarding the pursuit of the punitive remedy. Without some evidence of an actual conflict, the district court did not abuse its discretion by granting class certification.

IV. Judgment Against Connell and Morgenstern

Plaintiffs contend that the district court erred by refusing to enter judgment against defendants Kathleen Connell, the State Controller of California, and Marty Morgenstern, Director of the Department of Personnel Administration. This argument is also foreclosed by our caselaw. In *Foster v. Mahdesian,* 268 F.3d 689, 694 (9th Cir.2001), *cert. denied, Foster v. Garcy,* --- U.S. ----, 122 S.Ct. 2327, 153 [897]L.Ed.2d 159 (2002), we held that a public sector employer who deducts "fair share" fees from an employee's paycheck is not liable if the union fails to provide adequate notice under *Hudson.* We stated that "the routine collection of agency fees does not trigger a duty ... to ensure that every employee has received a proper *Hudson* notice." *Id.* at 693. Such a duty arises only if the employer takes "adverse action" against the fee payer. *See Knight,* 131 F.3d at 817. "Adverse action" must be more serious than the routine collection of fees. *Foster,* 268 F.3d at 693.

Plaintiffs offer no explanation why Morgenstern should be liable for the defective *Hudson* notices. Instead, they again

suggest that *Foster* should not be followed because it conflicts with language in *Knight* regarding when an employer has an obligation for the sufficiency of a *Hudson* notice. *Knight,* 131 F.3d at 817 (holding that a school district cannot take "adverse action" against a nonmember employee without ensuring adequate *Hudson* notice was given). *Foster,* however, contains a detailed discussion of the *Knight* decision. 268 F.3d at 693-94. Rather than conflicting with *Knight*, *Foster* interprets and clarifies *Knight* and the meaning of the term "adverse action" within that decision. *See id.*

With respect to defendant Connell, the plaintiffs attempt to distinguish *Foster* because Connell is also responsible for mailing the *Hudson* notices. This fact is not significant. The State Controller is responsible for mailing the *Hudson* notices because of the large number of employees who have requested that their home addresses not be disclosed outside of state government. The act of mailing notices is only a ministerial function; there is no suggestion the Controller has any responsibility for the content of such notices. Moreover, it would be strange to say that the mere act of mailing notices is "adverse action" against an employee, when the act of taking money from their check is not. *See id.* The district court properly declined to enter judgment against Connell and Morgenstern.

V. Permanent Injunction

The district court's denial of a permanent injunction is reviewed for abuse of discretion. *Tollis, Inc. v. San Bernardino County,* 827 F.2d 1329, 1331 (9th Cir.1987). Plaintiffs contend that the district court abused its discretion by failing to grant a permanent injunction "barring all fee seizures from the nonmembers in the absence of adequate notice and procedures."

In seeking a permanent injunction, the moving party must convince the court that relief is needed: "The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *United States v. W.T. Grant Co.,* 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953). In this case, the district court did not believe that a permanent injunction was warranted, noting that the Union mailed a proper notice in May 2000 for the 1999 fee payer year and then mailed another proper notice in June 2000 for the 2000 fee payer year. Thus, the court found "a constitutional agency-fee collection procedure is established and operating, and injunctive relief is no longer warranted." In addition, the Union's controller, Patrick Haagensen, declared under penalty of perjury that the Union would use the same *Hudson* notice format in the future.[3]

[898]In a recent decision involving similar facts, we held that a district court had properly refused to grant declaratory and injunctive relief where a union had mailed an inadequate notice in October 1998, but then mailed a proper notice in December. *Carlson v. United Academics,* 265 F.3d 778, 786 (9th Cir.2001), *cert. denied,* 535 U.S. 970, 122 S.Ct. 1437, 152 L.Ed.2d 381 (2002). We noted that "[i]t is unreasonable to think that the Union would resort to conduct that it had admitted in writing was constitutionally deficient and had attempted to correct.... We do not believe United Academics would now attempt to revert to the deficient notice format and subject itself to future litigation that it would clearly lose." *Id.* at 786-87; *see also Wessel,* 299 F.3d at 1194 (holding that there

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[3] We note that the inclusion of an allocation audit is no longer required in light of our holding in Section I, above.

is no need for permanent injunction where union issued corrected fair share notice and committed itself to include required information in future notices).

The requirements of *Hudson* in this circuit have been clarified by this litigation. As in *Carlson,* it would be foolish for the Union to now revert to a deficient format and subject itself to additional lawsuits. The district court did not abuse its discretion by refusing to grant a permanent injunction.

VI. Standing to Challenge Indemnification Clause

Plaintiffs also challenge the district court's determination that they lacked standing to challenge indemnification clauses in the CBAs regarding liability for seizure of compulsory dues. This issue was initially decided in *Prescott I,* 177 F.3d at 1112 (finding plaintiffs lacked standing). *Prescott I* was then vacated and remanded by the Supreme Court for reconsideration in light of *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.,* 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). The panel in turn remanded the case to the district court for reconsideration of the standing issue. *Prescott v. County of El Dorado ("Prescott II"),* 204 F.3d 984, 984-85 (9th Cir.2000).

On remand, the district court again found that the plaintiffs lacked standing to challenge the indemnification clause. On appeal, we recently affirmed once more, again finding that the plaintiffs lacked standing. *Prescott v. County of El Dorado ("Prescott III"),* 298 F.3d 844, 846 (9th Cir.2002). Plaintiffs concede that *Prescott III* controls their claim as well, and we therefore affirm the district court's determination that the plaintiffs lack standing to challenge the indemnification clauses.

VII. Attorneys' Fees and Costs

On remand, the district court should reconsider the issue of attorneys' fees and costs to determine whether further reduction is appropriate in light of our decision regarding the proper remedy for the *Hudson* violation. We do, however, believe it may be helpful to speak to the issue of the initial cost award, as the Union contends that the district court abused its discretion by awarding plaintiffs nearly all their costs despite substantially reducing the fee award to reflect limited success on the merits.[4]

From our reading of the district court's order, it appears that the court recognized that it had the discretion to reduce the cost award as well, but declined to do so because the costs incurred were sufficiently related to the successful claims to justify the full award. Because the Union seems to think the court did not **[899]**recognize its ability to reduce the cost award, we wish to clarify that the district court *may* reduce costs to reflect limited success on the merits, *see, e.g., Bryant v. City of Chicago,* 200 F.3d 1092, 1102 (7th Cir.), *cert. denied,* 531 U.S. 821, 121 S.Ct. 64, 148 L.Ed.2d 30 (2000); *Case v. Unified Sch. Dist. No. 233,* 157 F.3d 1243, 1258 (10th Cir.1998), but that it is not required to do so if such costs are sufficiently related to the plaintiffs' successful *Hudson* claim.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Each party to bear its own costs on appeal.

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[4] Plaintiffs had contended that the Union had miscalculated the fee by charging fee payers for two nonchargeable expenditures, but were unsuccessful on these claims. Plaintiffs did not appeal from the grant of summary judgment to defendants on these claims.

APPENDIX B

FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

31 July 2001

[Clerk's stamp omitted in printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

AMENDED
JUDGMENT IN A CIVIL CASE

CHRISTINE A. CUMMINGS, et al.,

v. CASE NUMBER: CIV S-CIV S-99-2176 WBS DAD

KATHLEEN CONNELL, Controller, State of California, et al.,

XX -- **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF JULY 31, 2001.

Jack L. Wagner,
Clerk of the Court

ENTERED: July 31, 2001

by: /s/
P. Castro, Deputy Clerk

APPENDIX C

MEMORANDUM AND ORDER RE MOTION TO RECONSIDER OR AMEND JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

31 July 2001

[Clerk's stamp omitted in printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHRISTINE A. CUMMINGS, et al.,

NO. CIV. S-99-2176 WBS DAD

Plaintiffs,

v.

MEMORANDUM AND ORDER RE MOTION TO RECONSIDER OR AMEND JUDGMENT

KATHLEEN CONNELL, Controller, State of California, et al.,

Defendants.

Defendant California State Employees Association, Local 1000 ("CSEA") seeks relief from the judgment entered on this court's order of May 2, 2001 granting plaintiffs' motion for summary judgment in part and awarding partial restitution of withdrawn fees, pursuant to Federal Rule of Civil Procedure 60(b), or in the alternative, alteration or amendment of the judgment pursuant to Rule 59(e).

In its May 2, 2001 order, the court awarded restitution of the non-chargeable portion of the withdrawn fees to all nonmembers, including those who did not object pursuant to the [2]May 2000 notice. CSEA's present motion is based on the ground that an "intervening" Ninth Circuit decision, decided after this court's decision filed May 2, "makes clear that the remedy should only run to those fee payers who filed

objections in response to CSEA's May 2000 Notice." (Def. CSEA's Notice of Motion and Motion for Relief from Judgment, filed June 11, 2001, at 2:6-8).

In the alternative, CSEA moves to alter or amend the judgment, on the ground that CSEA should not be required to refund fees collected after the nonmembers received the May notice, which plaintiffs agree was adequate under Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986). CSEA also argues that the award does not account for CSEA's mid-year fee adjustment, which reduced the non-chargeable portion of the fee.

Discussion

A. Motion for Relief from Judgment

Preliminarily, plaintiffs urge this court not to consider the merits of CSEA's arguments on this motion, citing Ninth Circuit authority for the proposition that an alleged change in judicial review of applicable law after final judgment is not a sufficient basis for vacating such judgment entered before announcement of the change. See Title v. United States, 263 F.2d 28, 31 (9th Cir. 1959); see also Perrin v. Aluminum Co. of America, 197 F.2d 254, 255 (9th Cir. 1952) ("Rule 60(b) was not intended to be resorted to as an alternative to review by appeal[.]".

CSEA , on the other hand, argues that both its Rule 59(e) and 60(b) motions are timely, citing Local Rule 78-230(k). See also School Dist. No. 1J, Multnomah County, Or. v. AC and S, [3]Inc., 5-F.3d 1255, 1262-63 (9th Cir. 1993); United States v. Westlands Water Dist., 134 F. Supp. 2d 1111, 1130 (E.D. Cal. 2001). Both sides agree that an appeal will be taken from this court's judgment, regardless of how the court rules on the

pending motion, and that the Court of Appeals will ultimately have to deal with any cases decided after this court's judgment became final. Therefore, in order to provide the appellate court with the a complete record, the court resolves this threshold conflict in favor of addressing CSEA's arguments on their merits.

CSEA argues that the Ninth Circuit's recent decision in United Food and Commercial Workers Union, Local 1036 v. National Labor Relations Bd., 249 F.3d 1115 (9th Cir. 2001), requires that this court grant CSEA relief from the court's order awarding a partial refund to nonmembers who did not object pursuant to the May notice.[1] In Local 1036, the Ninth Circuit considered whether the union violated a provision of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(b)(1)(A), "by informing new employees [in a 'welcome letter'] that they were required as a condition of employment to become full members of [the local union]." Id. at 1117. The National Labor Relations Board (the "Board") found that the welcome letter violated the NLRA, and ordered the union to notify all bargaining unit members of their rights, and reimburse those employees who now object to being full union members. Id. at 1118.

The Ninth Circuit affirmed the Board's finding of a [4]violation, but concluded that "the remedial order goes too far." Id. at 1120. In reaching its conclusion, the Ninth Circuit emphasized that "[t]he offending letter was not sent to all employees." Id. The Ninth Circuit then stated: "Reimbursement is due only those employees who received the [offending] letter and object." Id.

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[1] Because all objectors have already received the refund mandated by the court's order, CSEA argues that the order should be vacated.

This language does not compel this court to change its order in the present case. The union's collection of fees in Local 1036 was not subject to constitutional scrutiny because union security clauses negotiated between a union and a private employer under the NLRA "do not involve state action implicating constitutional considerations." See California Saw and Knife Works, 320 N.L.R.B. 224, 228 (1995), cert. denied, Strang v. N.L.R.B., 525 U.S. 813 (1998). Thus, the union was not required to satisfy the minimal procedure requirements set forth in Hudson, or the collection standards expressed in Grunwald v. San Bernardino City Unified School District, 994 F.2d 1370 (9th Cir. 1993). See Hudson, 475 U.S. at 304-309 ("The Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 244 (1977)); Grunwald, 994 F.2d at 1373 (requiring an adequate explanation for the use of a deduction-escrow-refund procedure, and a reasonably prompt refund).

In finding the remedy over-broad, the Ninth Circuit noted only that the offending letter was not sent to all **[5]**employees. In order to accept CSEA's interpretation of Local 1036 the court would have to infer that the Ninth Circuit would have also found the remedy over-broad if the Board did not include an objection requirement. Such an inference would be based on pure speculation and does not warrant relief from the judgment in this case.

CSEA further argues that Local 1036 re-affirms the rule that a nonmember's "dissent is not to be presumed." See Abood, 431 U.S. at 238 (quoting International Ass'n of Machinists v. Street, 367 U.S. 776, 774 (1961)). According to

CSEA, this court's remedy is inconsistent with that rule because the refund "depends on an implicit finding that [non-objectors] would have objected to CSEA's original Hudson notice if only that notice had complied with Hudson." (Def.'s Mot. at 10:5-8). CSEA argues that such a presumption contradicts established precedent that "a union is permitted to charge the equivalent of full union dues, including the so-called 'non-chargeable' amount, to all non-members who do not object." (Def.'s Mot. at 10:2-4) (emphasis omitted).

This statement of the law is incomplete, and neglects to take into account the collection method employed by CSEA in this case. As this court noted in its May 2 order, a union is only permitted to collect full union dues when such collection complies with the minimal procedural requirements necessary to protect nonmembers' First Amendment rights. See Hudson, 475 U.S. at 304-309; Grunwald, 994 F.2d at 1373. Although the Supreme Court has acknowledged readily available alternatives, such as an advance reduction of dues paid by nonmembers, CSEA utilized a **[6]**"more cumbersome and intrusive" deduction-refund procedure by collecting fees from nonmembers for non-germane expenditures before they received adequate notice and an opportunity to object.[2] Grunwald, at 1375 (discussing the "deduction-*escrow*-refund" method); see Hudson, at 304 (quoting Ellis v. Railway Clerks, 466 U.S. 435, 444 (1984)); see also Grunwald, at 1377 ("Ideally . . . the union would collect from nonmembers only that amount used

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[2] CSEA's fee calculation for nonmembers discounted only those expenditures relating to member-only benefits, such as group insurance plans and entertainment discounts. The court discerns from the record that CSEA collected union fees from nonmembers without the use of an escrow procedure for eight months until this court enjoined the seizures in December of 1999.

for representational purposes."). In such circumstances, the Ninth Circuit has emphasized the importance of an escrow procedure, as well as a prompt notice and refund to minimize the impingement on nonmembers' First Amendment interests. See Grunwald, at 1374-76 (emphasizing that the use of escrow enures that money collected from nonmembers would "not be used, even temporarily, for ideological purposes"); Knight, 131 F.3d at 812 ("as soon as practicable, the union must send out proper notices").

In its May 2 order, this court pointed out that "[t]his case is materially different from Grunwald." ("Memorandum and Order, filed May 2, 2001, at 12:1); Grunwald, 994 F.2d at 1375-77 (holding that the deduction-escrow-refund procedure employed in that case adequately protected the plaintiffs' First Amendment rights). Here, plaintiffs did not receive adequate notice until May 2000, thirteen months after deductions began in the absence [7]of an escrow procedure. Thus, under Grunwald, the May notice does not constitute a reasonable accommodation of plaintiffs' First Amendment right to a "fair, prompt and effective procedure." Grunwald, at 1373. Accordingly, CSEA is not entitled to retain the full union dues it collected.

The court's measure of relief is appropriate because it allows the union to retain the chargeable portion of the fees, to which it was, "doubtlessly, entitled" as plaintiffs' collective-bargaining representative. Prescott v. County of El Dorado, 177 F.3d 1102, 1109 (9th Cir. 1999) (citing Gilpin v. American Fed. of State, County, and Mun. Employees, 875 F.2d 1310, 1315 (7th Cir. 1989)). Because CSEA has not demonstrated circumstances warranting relief from judgment under Rule 60(b)(6), the court must deny the motion.

B. Motion to Alter or Amend Judgment

The court may alter or amend a judgment under Rule 59(e) to correct clerical errors. See Fed.R.Civ.P. 59(e). This court awarded a partial refund based on the non-chargeable portion of fees collected during the 1999 fee-payer year, which includes the months from April 1999 through June 1999. CSEA notes that two fee payments were collected after plaintiffs received the May notice, which was adequate under Hudson.[3] It is not consistent with the court's intention to include fees collected at the end of May and June in the partial refund, and the court will amend the judgment accordingly.

In the May 2 order, the court determined that the non-[8]chargeable and thus, refundable portion of the collected fees was twenty percent of regular membership dues at the nonmember's salary level for the 1999 fee-payer year. (See Defs.' Ex. C, Attached to Harrigan Decl. in Support of CSEA's First Motion for Summary Judgment, filed July 6, 2000). This figure is correct for fees collected from April 1999 through December 1999.

However, in January 2000, CSEA adjusted its calculations by reducing the total fees collected from each nonmember.[4] The court's twenty-percent figure does not reflect this adjustment. Based on CSEA's calculations, the non-chargeable portion of the fees collected from January 2000 through April

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[3] The May notice was mailed on May 17, and the payments were collected at the end of May and June.

[4] CSEA reduced the nonmember's share of both chargeable and non-chargeable fees from ninety-three percent of full union dues, to eighty-eight and one-half percent. CSEA's calculation of the chargeable portion did not change, remaining at seventy-three percent.

2000 was fifteen and one-half percent, not twenty percent.[5] This calculation is consistent with the court's intention to refund only the non-chargeable portion of collected fees, and the court will amend the judgment accordingly.

IT IS THEREFORE ORDERED that defendant CSEA's motion for relief from judgment be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that defendant CSEA's motion to alter or amend the judgment be, and the same hereby is, GRANTED. The court's order filed May 2, 2001, is amended at page 25, lines 3-7, as follows: Defendant CSEA shall return to all plaintiffs who paid any "fair share" fees from April 1999 through April [9]2000, and who have not yet received an equivalent refund, twenty percent of regular membership dues at the fee-payer's salary level from April 1999 through December 1999, and fifteen and one-half percent of regular membership dues at the fee-payer's salary level from January 2000 through April 2000, with interest.

IT IS SO ORDERED.

DATED: July 30, 2001

/s/
WILLIAM B. SHUBB
UNITED STATES DISTRICT COURT JUDGE

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[5] Fifteen and one-half percent represents the difference between seventy-three percent (chargeable portion) and eighty-eight and one-half percent of full union dues (total fee for non-members).

APPENDIX D

FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2 May 2001

[Clerk's stamp omitted in printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

CHRISTINE A. CUMMINGS, et al.

v. CASE NUMBER: CIV S-99-2176 WBS DAD

KATHLEEN CONNELL, Controller, State of California, et al.

XX -- **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF MAY 2, 2001.

Jack L. Wagner,
Clerk of the Court

ENTERED: May 2, 2001

by: /s/
P. Castro, Deputy Clerk

APPENDIX E

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2 May 2001

[Clerk's stamp omitted in printing]
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHRISTINE A. CUMMINGS, et al.,

NO. CIV. S-99-2176 WBS DAD

Plaintiffs,

v. MEMORANDUM AND ORDER

KATHLEEN CONNELL, Controller,
State of California, et al.,

Defendants.

Named plaintiffs represent a class of state employees organized in bargaining units represented by defendant California State Employees Association, Local 1000 ("CSEA" or "the union"). Plaintiffs, who are not union members, allege that CSEA has been improperly withholding a portion of union dues from their paychecks without providing them with the procedural safeguards mandated by Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986). In addition, plaintiffs claim that the indemnification provision contained in the collective bargaining agreement between the union and the State of California is void as against public policy. Both plaintiffs and defendants move for summary judgment pursuant to Federal Rule of Civil Procedure 56.

[2]I. Procedural and Factual Background

CSEA is the exclusive representative for collective bargaining purposes of all employees in bargaining units 1, 3, 4, 11, 14, 15, 17, 20, and 21. In March 1999, defendants Morgenstern and CSEA entered into collective bargaining agreements allowing the state employer to deduct and forward "fair share" fees from plaintiffs' ("fee payers" or "nonmembers") paychecks to CSEA. The "fair share" purportedly represents the nonmember's share of the cost of collective bargaining. In April and June 1999, CSEA sent two notices to nonmembers regarding the "fair share" deductions ("April notice" and "June notice"). The June notice included the "1998 Expenditure Report," which was based on an independent audit (the "Audit") of CSEA's 1998 financial records prepared by the Gibson and Company, Inc., a certified public accounting firm.

Plaintiffs filed their complaint and moved for a preliminary injunction in November 1999, claiming that the April and June notices were constitutionally inadequate under Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986), because defendants did not provide an actual copy of the Audit with the notices. On December 20, 1999, this court certified the class and partially granted plaintiffs' motion.[1] Specifically, this court ordered [3]that upon the posting of a security bond, "defendants . . . shall be enjoined from seizing agency fees from

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[1] The court certified the following class: All former, current, and future State of California employees employed in Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20, and 21 who are, have been, or will be represented exclusively for purposes of collective bargaining by CSEA, but who are not, were not, or will not be members of CSEA, and were (after 2 March 1999), are, and/or will be nevertheless required to pay agency fees to CSEA as a condition of continued State employment. (Memorandum and Order filed Dec. 20, 1999, at 23:23-27).

plaintiffs or any member of the represented class until defendants have provided such plaintiff or member of the class with a copy of the auditor's report and the appropriate documentation." (Memorandum and Order filed Dec. 20, 1999, at 24:8-16).[2]

In January 2000, defendants mailed a copy of the Audit to plaintiffs. On January 19, 2000, plaintiffs moved for a temporary restraining order ("TRO"), claiming, among other things, that defendants did not change the deadline for plaintiffs to object to the notice after sending them the Audit. The court denied the motion for TRO in open court "on the condition that . . . defendants shall provide to the class members an adequate notice again making reference to the audits that are now being distributed, and allowing the plaintiffs and the members of the class an opportunity to challenge the audits pursuant to the discussion in Chicago Teachers Union v. Hudson." (Transcript of Jan. 19, 2000 TRO hearing, at 28:13-20).

On January 25, 2000, the Controller's Office mailed the "January 2000 Amended Notice" (the "amended notice") to the fee payers. Among other things, the amended notice referenced the Audit and extended the period for nonunion members to challenge the fee calculation until March 1, 2000. The court heard [4]plaintiffs' January 19 motion as a preliminary injunction on February 23, 2000, and denied the motion.

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[2] Agency fees are synonymous with "fair share" fees, which represent a nonmember's pro rata share of expenses incurred by the union in negotiating collective bargaining agreements. See Leer v. Washington Educ. Ass'n, 172 F.R.D. 439, 443 (W.D. Wash. 1997).

In May, CSEA mailed the "May 2000 Notice To Fee Payers" ("May notice"). This notice included an "allocation audit," which verifies a union's allocation of chargeable and non-chargeable expenses, and integrated the prior notices and the "1998 Expenditure Report." Plaintiffs agreed during oral argument that the May notice met the requirements of Hudson. The May notice allowed fee payers to retroactively object to all prior deductions, beginning with the first deduction in April 1999. According to defendants, by the end of March 2001, all objectors will have received a refund of the entire non-chargeable portion of the 1999 "fair share" fee, with interest.

Plaintiffs move for summary judgment on the adequacy of the April, June and January notices, as well as the validity of the indemnification provision contained in the collective bargaining agreements between the State of California and CSEA. Defendants move for summary judgment on the grounds that (1) the June and January notices are adequate as a matter of law; (2) plaintiffs have not suffered any compensable harm; (3) if plaintiffs have suffered compensable harm, their challenges to CSEA's expenditures have no merit; (4) plaintiffs do not have standing to challenge the indemnification provision; and (5) the indemnification provision is valid as a matter of law.[3]

[5]II. Discussion

The court must grant summary judgment to a moving party "if the pleadings, depositions, answers to interrogatories,

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[3] In addition, defendants Connell and Morgenstern move for summary judgment on the ground that the State employer has no duty to review "Hudson" notices prepared by CSEA. The court does not reach the merits of this issue because the court's award of partial restitution leaves no injury that is redressable against defendants Connell and Morgestern.

and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party adverse to a motion for summary judgment may not simply deny generally the pleadings of the movant; the adverse party must designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Simply put, "a summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). The non-moving party must show more than a mere "metaphysical doubt" as to the material facts. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

A. Adequacy of Notices Mailed by CSEA

Nonunion public employees can be compelled to pay their *pro rata* share of the costs of collective bargaining, contract administration, and grievance adjustment. See Hudson, 475 U.S. at 294. However, public employees cannot be compelled to support ideological causes that they oppose. See Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977) "[T]he Constitution requires that such expenditures be financed from charges, dues or assessments paid by employees who do not object to advancing [6]those ideas . . . . " Id. at 325-26.

In Hudson, the Supreme Court considered the procedural safeguards necessary to protect nonmembers' First Amendment rights. Hudson, 475 U.S. at 302. "The objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting [a union's] ability to require every employee to contribute to the cost of collective-bargaining activities." Id.

According to the Court, the minimal procedural requirements for deducting union fees from nonmembers paychecks include "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." Id. at 310. To comply with Hudson, unions generally send a "Hudson notice" to nonmembers.

1. Adequacy of the April and June Notices

The April and June notices were not adequate under Hudson because they did not adequately explain the basis for the fee. Specifically, the union failed to provide a copy of the Audit in the absence of a fee payer's formal request. Accordingly, plaintiffs are entitled to summary judgment with respect to these two notices.

Hudson requires that unions provide "adequate" or "sufficient" financial disclosure so that nonmember employees may "gauge the propriety of the union's fee." Hudson, 475 U.S. at 306. The union must provide nonmembers an "adequate explanation of the basis for the fee." Id. at 310. "The union need not [7]provide non-members with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." Id. at 307 n.18.

The Ninth Circuit has held that an adequate explanation of the basis of the fee includes an audit verifying that the union "actually spent the amounts of money it claimed to have spent on the chargeable activities." See Knight v. Kenai Peninsula Borough Sch. Dist., 131 F.3d 807, 813 (9th Cir. 1997); see also Prescott v. El Dorado County, 177 F.3d 1102, 1107-08 (9th Cir. 1999) ("real independent verification of the financial

data in question" required under Hudson), vacated in part and remanded, 528 U.S. 1111 (2000), reinstated in part and remanded, 204 F.3d 984 (9th Cir. 2000).

The Ninth Circuit has not explicitly addressed whether an auditor's report must be provided to nonmembers without a formal request.[4] The Sixth Circuit, however, has addressed this issue. In Damiano v. Matish, 830 F.2d 1363 (6th Cir. 1987), the Sixth Circuit held that:

> Hudson also mandates the verification of the union's calculations and disbursements from the fund by means of an independent auditor. . . . Morever, the union must provide this information to each employee, without formal request and within a reasonable period of time, to permit the employee to evaluate the calculation of the fees in order to make a reasonable appraisal of the fees . . . .

Id. at 1370. The Sixth Circuit's holding serves the policy behind Hudson, which is to ensure that nonmembers are provided **[8]**with sufficient information so that they can verify the expenditures without the burden of making a formal request.

The April notice did not serve the policy behind Hudson because it contained no financial disclosures. Although the June notice did contain the "1998 Expenditure Report," this report does not satisfy Hudson. The report stated:

> The information in this report on the amount of CSEA's expenditures in each of these categories in 1998 is taken from the independent audit of CSEA's 1998 financial

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[4] In Prescott, an audit was included in the notice and thus accessibility of the audit was not an issue.

> records contained in the Financial Statements prepared by Gibson and Company, Inc., a certified public accounting firm.

(Compl., Ex. F). The report did not include an actual copy of the audit, but offered to send a copy of the audit upon request. (See id.).

Offering to send an audit upon request does not allow plaintiffs to "gauge the propriety of the union's fee," Hudson, 475 U.S. at 306, nor does it tell the fee payers that the union actually spent the money the way that it claimed. See Knight, 131 F.3d at 813. In order to analyze the data for themselves, plaintiffs would have to either accept defendants' word that the expenditures were audited, or make a formal request for the audit. Therefore, the explanation was inadequate, and plaintiffs are entitled to summary judgment as to the April and June notices.

2. January 2000 Notices

Plaintiffs challenge both notices mailed in January. The first notice was mailed on or about January 14, 2000, and included the Audit. It was inadequate as a matter of law because it did not provide plaintiffs with a reasonable opportunity to object. The second "amended" notice was mailed on January 25, [9]2000, for the purpose of extending a prior deadline to allow plaintiffs a reasonable opportunity to object to the Audit. The court finds that it was likewise inadequate under Hudson.

The amended notice of January 25 directed fee payers to the June notice and the previously mailed Audit, and stated: "These documents together explain why the [CSEA] has set the ["fair share"] fee at 88.5% of dues." (Haagensen Decl., Ex. B,

Attached to CSEA's First Motion for Summary Judgment). In denying plaintiffs' second motion for preliminary injunction, this court noted:

> Although plaintiffs knew as of the date of the first hearing for preliminary injunction that defendants were only planning to send a copy of the audit to the fee payers, they did not make it clear at the time of that hearing that they thought defendants needed to send a new, complete notice with the audit.

(Memorandum and Order filed Feb. 29, 2000, at 8). Defendants have made a good faith effort, under the court's direction, to correct the apparent defects in the notices. See id. (recognizing that in an attempt to reach a resolution satisfactory to plaintiffs, the court itself may have led defendants into the "piecemeal" approach of correcting the apparent defects). Nevertheless, the court previously acknowledged that it was possible that plaintiffs may ultimately succeed in establishing that the "piecemeal remedial measures" were inadequate under Hudson. See id. at 7-8.

The First Amendment requires that the procedure for collecting fair share fees "be carefully tailored to minimize the [inherent] infringement" on nonmembers' constitutional rights. Hudson, 475 U.S. at 303; see id. at 307 n.20 ("the agency shop [10]itself is 'a significant impingement on First Amendment rights'" (quoting Ellis, 466 U.S. at 455)). This requirement is satisfied in part when nonmembers are give sufficient information from which to "gauge the propriety of the union's fee." Hudson, 475 U.S. at 306; see id. at 310 (also requiring a reasonably prompt opportunity to challenge the amount of the fee, and an escrow for the amounts reasonably in dispute).

The court has already concluded here that Hudson requires the union to provide a copy of the Audit without formal a request by plaintiffs. "The purpose of an audit is to have an independent accountant determine whether the union has actually spent the amounts of money it claimed to have spent on the chargeable activities." Knight, 131 F.3d at 813. This information must be provided "within a reasonable amount of time" to allow nonmembers to gauge the propriety of the fee. Damiano, 830 F.2d 1363, 1370.

In order to verify the union's expenditures for chargeable activities, plaintiffs must cross-reference the Audit provided in January with the "1998 Expenditure Report" included in the June notice, which identifies the chargeable and nonchargeable expenditures. The court does not conclude that the law requires that non-union members in all cases be provided a single integrated notice in order to satisfy the requirements of Hudson. However, the court finds that the separation of almost six months between the necessary components for explaining the basis of the fee in this case did not minimize the inherent infringement on plaintiffs' First Amendment rights. Accordingly, the amended notice, which incorporated by reference the June [11]notice and the Audit, did not meet the requirements of Hudson. Therefore, plaintiffs are entitled to summary judgment as to both notices mailed in January of 2000.

B. Compensable Harm

Defendants argue that plaintiffs have not suffered compensable harm because the deduction of union dues from nonmembers paychecks was followed by a proper Hudson notice in May of 2000 and a new opportunity to object to prior deductions.

In Grunwald v. San Bernardino City Unified School District, 994 F.2d 1370 (9th Cir. 1993), the Ninth Circuit considered whether the use of a "deduction-escrow-refund" procedure for the payment of agency fees violated the First Amendment. In that case, the union deducted full union dues from the paychecks of nonmembers and placed the fees in an escrow account. Thereafter, the union mailed a Hudson notice to nonmembers and allowed them to seek a rebate for the portion of dues representing expenditures that were not germane to collective bargaining. The Ninth Circuit held that such a method did not violate the First Amendment because the escrow procedure ensured that money collected from nonmembers would "not be used, even temporarily, for ideological purposes." Id. at 1374, see also Hudson, 475 U.S. at 305-307. Further, the court emphasized that the union reasonably accommodated the nonmembers' First Amendment interests by providing adequate notice as soon as practicable, and a prompt refund. Grunwald, 994 F.2d at 1375-76; see also Knight, 131 F.3d at 812 ("as soon as practicable, the union must send out proper notices").

[12]This case is materially different from Grunwald. Here, defendants began deducting fees from plaintiffs' paychecks in April 1999. However, defendants did not reduce the fees in advance to reflect only those expenditures that are germane to collective bargaining.[5] Nor have defendants demonstrated that nonmembers' fees were never used, even temporarily, for ideological purposes. The court finds no support in the record

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[5] The fees paid by nonmembers were reduced only to exclude expenditures relating to member-only benefits, such as group insurance plans and entertainment discounts. The fees were not reduced in advance to exclude expenditures such as charitable donations and legislative advocacy.

to conclude, consistent with Grunwald, that plaintiffs' fees (both objectors and non-objectors) were placed in escrow beginning with the initial deductions in April 1999. Further, plaintiffs did not receive adequate notice under Hudson until May of 2000, almost thirteen months after the initial deduction.

In contrast, the plaintiffs in Grunwald received adequate notice no later than fifteen days after the initial deduction. Although the May notice is retroactive, the court cannot conclude, as a matter of law, that the May notice constitutes a reasonable accommodation of plaintiffs' First Amendment right to a "fair, prompt and effective procedure." Grunwald, 994 F.2d at 1373; see also Ellis, 466 U.S. at 440-41 ("By exacting and using full dues, then refunding months later the [non-chargeable] portion, the union effectively obtains an involuntary loan for purposes to which the employee objects."); Knight, 131 F.3d at 812 (stating that "as soon as practicable, union must send out proper notices"). Therefore, defendants have [13]not demonstrated that plaintiffs have suffered no compensable harm. See Knight, 131 at 812 (finding that union's refund of monies received is relevant to amount of damages, but does not moot claims under Hudson).

C. Appropriate Relief

Plaintiffs argue that all non-union members, both objectors and non-objectors, are entitled to full restitution of deductions made prior to May 2000. In the alternative, plaintiffs request that the court "adjudicate the appropriately chargeable fee," and award restitution of the non-chargeable deductions. The court treats plaintiffs' alternative request as a challenge to the propriety of the "fair share" fee calculated in the May notice. The court considers first whether plaintiffs are entitled to full or partial restitution, and second, because defendants have raised

the issue on summary judgment, whether there are any triable issues with respect to CSEA's determination of the chargeable "fair share" fee.

1. Refund of Non-Chargeable Portion of the Fee

Under Prescott, plaintiffs are not entitled to full restitution of the deducted fees. See Prescott, 177 F.3d at 1109 (finding that "demand for full restitution was punitive insofar as it sought to deprive the union of fees to which it was, doubtlessly, entitled"). However, plaintiffs may recover the portion of the fees collected for expenditures that are not "germane" to the union's collective-bargaining activity. See Abood, 431 U.S. at 238 (discussing restitution as an appropriate remedy); see also Lehnert v. Ferris Faculty Ass'n, 500 U.S. 506, 519 (1991) ("chargeable activities must . . . be 'germane' to [14]collective-bargaining").

In awarding partial restitution, the court is not presuming dissent by all nonmembers. See Abood, 431 U.S. at 238 ("dissent is not to be presumed" (quoting International Ass'n of Machinists v. Street, 367 U.S. 776, 774 (1961)). Rather, the court finds that plaintiffs had no burden to object where, as here, deductions were made in the absence of a reasonably prompt notice that satisfied the requirements of Hudson. See Hudson, 475 U.S. at 309 (finding certain requirements necessary to minimize both the impingement on nonmembers' First Amendment interests and their burden of objection); Airline Pilots v. Miller, 523 U.S. 866, 878 (1998) ("The very purpose of Hudson's notice requirement is to provide employees sufficient information to enable them to identify the expenditures that, in their view, the union has improperly classified as germane."). Therefore, the court concludes that all class-members, not just those who objected to non-germane

expenditures pursuant to the May notice, are entitled to a refund of the non-chargeable portion of their "fair share" fee payments for the 1999 fee payer year.[6]

2. Chargeable Expenditures

Plaintiffs contend that "all of CSEA's expenditures are legally non-chargeable," and defendants have the burden of demonstrating "from contemporaneous hard data" that all the activities charged to fee payers were germane to collective bargaining. (Opp'n at 55:18-20, 56:18-22, 57).

[15]In Airline Pilots v. Miller, 523 U.S. 866 (1998), the Supreme Court recognized that while "the nonunion employee has the burden of raising an objection, . . . the union retains the burden of proof." Miller, 523 U.S. at 877 (quoting Hudson, 475 U.S. at 306). However, a plaintiff who is challenging the calculation of an agency fee cannot "file a generally-phrased complaint, then sit back and require the union to prove the 'germaneness' of its expenditures without a clue as to 'which of its thousands of expenditures' the objectors oppose." Miller, 523 U.S. at 878. In federal court, "agency-fee challengers, like all other civil litigants, must make their objections known with the degree of specificity appropriate at each stage of litigation . . . ." Id.

Pursuant to Miller, plaintiffs must "point to the expenditures or classes of expenditures [they] find questionable" with the degree of specificity appropriate on summary judgment. Miller, 523 U.S. at 878. Plaintiffs claim that CSEA

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[6] Defendants claim that by the end of March 2001, all objectors received a refund of the entire non-chargeable portion of the 1999 "fair share" fee, with interest, according to the fee calculation provided in the May notice.

"Board of Directors" meetings, and "other meetings regarding association governance," were not 100% chargeable because those meetings involved activities of a political nature. (Pls.' Opp'n at 57:10-13); (Defs.'s Ex. B at 14:3-7, Attached to Gibbons Decl.). Plaintiffs further claim that a CSEA employee, Cathy Hackett, improperly recorded a non-chargeable activity as chargeable to fee payers on her time sheet. (Pls.' Opp'n at 57:4-9). Plaintiffs have not pointed to any other expenditures that they **[16]**claim were improperly charged.[7]

Defendants argue that the expenditures challenged by plaintiffs are chargeable as a matter of law. In Lehnert, the Supreme Court held that "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." Lehnert, 500 U.S. at 519. The Supreme Court has recognized that the test for determining whether expenditures are germane to collective bargaining, and thus chargeable to nonmembers, is "whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." Ellis, 466 U.S. at 448; see also Lehnert,

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[7] Plaintiffs have previously challenged expenditures relating to the organizing costs of an affiliate union, the "Service Employees International Union" ("SEIU"). However, defendants note that the May notice categorized SEIU organizing expenditures as non-chargeable and accordingly lowered the chargeable fee. Thus, CSEA's calculation of the "fair-share" fee does not include SEIU organizing expenditures, and plaintiff's challenge to this expenditure is accordingly moot.

500 U.S. at 523 (extending the reasoning of Ellis to public-sector unions). The Court has "never interpreted that test to require a direct relationship between the expense at issue and some tangible benefit to the [nonmembers'] bargaining unit." Lehnert, 500 U.S. at 522.

In Ellis, the Supreme Court considered whether certain expenditures were germane to collective bargaining. See 466 U.S. [17]at 448-455 (considering expenses related to national union conventions, social activities, publications, and organizing efforts outside the bargaining unit). The Court had "very little trouble in holding that [nonmembers] must help defray the costs of [national] conventions." Id. at 448. The Court concluded that such events were chargeable despite the fact that the convention activities included major addresses by prominent politicians. But see id. at 459 (Powell, J., dissenting) (suggesting that the union should be required to make "reasonable estimates" of expenses fairly attributable to political activities and make "appropriate deductions from the dues of objecting employees").

According to the Court in Ellis, "if a union is to perform its statutory function [as an exclusive bargaining representative], it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy." Id. at 448. The Court emphasized that unions must have a "certain flexibility" in their use of compelled funds. Id. at 456. (stating that expenses related to union conventions and publications are "well within the acceptable range" of costs reasonably incurred for collective bargaining purposes). Further, the Court found that because the costs associated with conventions "relate to the work of the union in the realm of collective bargaining," such expenses are justified by the governmental interest in

overcoming the free-rider problem. Id. Allowing such expenses imposes "little additional infringement on First Amendment rights beyond that already [18]accepted" in the nature of the agency shop itself. Id.

Like conventions, board meetings "are a standard feature of union operations." Id. at 450; see also Abood, 431 U.S. at 223 ("The furtherance of the common cause leaves some leeway for the leadership of the group." (quoting Machinists v. Street, 367 U.S. 776, 778 (1961)). The Court in Ellis did not hold that unions must allocate time spent during such meetings for germane and non-germane activities. Requiring a union to apportion time spent during board meetings would remove the flexibility necessary for the union's performance of its function as an exclusive collective bargaining representative. See Fell v. Independent Association of Continental Pilots, 26 F. Supp. 2d 1272, 1280-81 (D. Colo. 1998) (finding that "the expenses surrounding the Board of Director's meetings are germane."). Therefore, the court finds that costs associated with board meetings, and other meetings related to the governance of the union as a collective bargaining representative, are germane and chargeable as a matter of law.

Plaintiffs also claim that a CSEA employee, Cathy Hackett, improperly recorded "organizing campaign" activity as chargeable to fee payers on her time sheet. In Ellis, the Court held that organizing expenses associated with the recruitment of employees outside the bargaining unit are not chargeable because such costs are not justified by the governmental interest in overcoming the free-rider problem. See Ellis, 466 U.S. at 452. Here, defendants have offered uncontroverted evidence that the notation "organizing campaign," referred to a "contract campaign" in which Cathy Hackett organized existing bargaining [19]unit members to discuss contract proposals and

generate support among unit members for CSEA's position at the bargaining table. (See Hackett Decl. ¶¶ 4-5) ("Among other things, the campaign publicized CSEA's bargaining proposals, organized rallies in support of CSEA's bargaining teams, and conducted worksite meetings at which the progress of negotiations and related matters were discussed."). Unlike in Ellis, the costs associated with Cathy Hackett's organizing activity were necessarily and reasonably incurred for CSEA's purpose of performing its duties as a collective bargaining representative. Plaintiffs have not offered any evidence to dispute defendants' showing. Therefore, the expenditures are germane and thus, chargeable to fee-payers.

In sum, defendants are entitled to summary judgment on plaintiffs' challenge to the propriety of the "fair share" fee. The court will accordingly award partial restitution based on CSEA's calculation of the non-chargeable portion of the "fair share" fee. Pursuant to the May notice, CSEA's calculation of non-germane expenditures is twenty-seven percent of regular membership dues at the fee-payer's salary level for the 1999 fee-payer year.[8] (See Defs.' Ex. C, Attached to Harrigan Decl. in Support of CSEA's First Motion for Summary Judgment, filed July 6, 2000). Plaintiffs who did not object under the May notice paid ninety-three percent of regular membership dues as their **[20]**"fair share" fee. See id. Thus, the appropriate restitution

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[8] Plaintiff has filed an evidentiary objection to defendants' Exhibit A, attached to the declaration of Patrick Haagensen in support of CSEA's Second Motion for Summary Judgment. Exhibit A appears to be a copy of the Supplemental Award and Opinion issued in arbitration proceedings which took place during June and August 2000. The court has not made any reference to Exhibit A in making its determination, and thus need not rule on the document's admissibility.

for those plaintiffs who have not yet received a refund is twenty percent of regular membership dues at the fee-payer's salary level.

3. Permanent Injunctive Relief

In their prayer for relief, plaintiffs seek a "permanent injunction prohibiting [d]efendants from taking any action to demand or collect from plaintiffs and class members, by any means, so-called 'fair share fees,' and from taking any other action to enforce the 'fair share fee' provisions of the State/CSEA memoranda of understanding, . . . until a constitutional agency fee seizure approved by this Court is established and operating." (Comp. at 14:14-18). Plaintiffs agreed during oral argument that the May notice, provided for the 1999 fee payer-year, satisfied the requirements of Hudson. It is further undisputed that defendants mailed a Hudson notice for the 2000 fee payer-year consistent with the satisfactory format of the May notice. Accordingly, a constitutional agency-fee collection procedure is established and operating, and injunctive relief is no longer warranted.

C. Validity of Indemnification Provisions

Plaintiffs argue that the collective bargaining agreements contain an indemnification provision that is "void as against public policy" because the provision creates disincentives for defendants' protection of plaintiffs' **[21]**constitutional rights.[9]

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[9] Each agreement contains the following indemnification provision:

> The Union agrees to indemnify, defend, and hold the State and its agents harmless against any claims made of any nature and against any suit instituted against the State arising from . . .

(continued...)

Defendants argue that plaintiffs do not have standing to contest the provisions and further, that the provisions do not violate public policy.

In Prescott v. County of El Dorado, 177 F.3d 1102 (9th Cir. 1999), the Ninth Circuit affirmed the district court's holding that a public employee lacked standing to challenge an indemnification provision in a collective bargaining agreement between a labor union and a public employer. The Supreme Court vacated and remanded the Ninth Circuit's decision for consideration in light of Friends of the Earth v. Laidlaw Environmental Servs., 528 U.S. 167 (2000).[10]

In Prescott, the Ninth Circuit acknowledged that the plaintiffs suffered some injury when fees were deducted from their paychecks, but concluded that the plaintiffs could not demonstrate that the injury was fairly traceable to the indemnification provision. See Prescott, 177 F.3d at 112. The court characterized the plaintiffs' claim that "the provision will somehow cause the [public employer] to ignore its own

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[9] (...continued)
payroll deductions . . . .
(Pls.' Ex. A(1), Art. 4, sec 3.2(b), Attached to Plaintiffs' Statement of Undisputed Material Facts).

[10] The Ninth Circuit then vacated and remanded the district court's standing determination. See Prescott, 204 F.3d 984 (reinstating its prior decision in part). In an order filed April 17, 2001, Judge Karlton granted defendants' motion for summary judgment, finding that the plaintiffs did not have standing to challenge the indemnification provision. Prescott, No. 95-1859 LKK/JFM.

[22]duties" as "rank speculation." The court finds nothing in Laidlaw that alters this conclusion.[11]

Plaintiffs offer no evidence of defendants' motivation with respect to the indemnification clause. Instead, plaintiffs contend that "the principle of res ipsa loquitur would seem to apply to [indemnification] clauses which appear only within forced-unionism provisions" of collective bargaining agreements. However, the existence of the provision alone cannot satisfy plaintiffs' burden to show that their alleged harm is fairly traceable to the indemnification provision. See Lujan, 504 U.S. at 561 ("The party invoking federal jurisdiction bears the burden of establishing these [standing] elements.").

Further, the Ninth Circuit held that the plaintiffs' claim that their injury would be redressed by a favorable decision striking the indemnification provision was also based on pure speculation. Id. ("[I]t can hardly be said that our striking down of the provision would lead to some irenic world wherein all fee deduction procedures were properly followed because someone would finally have an incentive to assure that they were."). Laidlaw appears to alter this analysis only by adding the principle that a remedy affords redress for the threat of contin-

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[11] The Supreme Court alluded to the causal inquiry when it concluded that it saw "nothing improbable" about the proposition that the defendants' alleged discharge of illegal pollutants into a river caused the plaintiffs' to curtail their recreational use of the waterway. However, the Court made this determination in the context of whether the plaintiffs' suffered an injury in fact that was not conjectural or hypothetical. Accordingly, this court does not interpret Laidlaw to create a "nothing improbable" standard for determining whether a plaintiff's injury is fairly traceable to the challenged conduct.

uing violations when it "encourage[s] defendants to **[23]**discontinue current violations and deter[s] them from committing future ones." Laidlaw, 528 U.S. at 186. The Supreme Court acknowledged, however, that "there may be a point at which the deterrent effect of a [remedy] becomes so insubstantial or so remote that it cannot support . . . standing." Id.

Plaintiffs argue that "the threat of future violations would be redressed by entry of prospective declaratory and injunctive relief prohibiting" enforcement of the indemnification clause, and "thus forcing [defendant] Connell to execute her duties absent the umbrella of indemnification provided by the clause." (Opp'n at 25:1-3). In order to prevail on this argument, plaintiffs must first demonstrate that the threat of future violations is an injury that is "actual or imminent, not conjectural or hypothetical." Laidlaw, 528 U.S. at 180-81.

In Los Angeles v. Lyons, 461 U.S. 95 (1983), the Supreme Court denied standing on the ground that the plaintiff could not credibly allege that he faced a realistic threat of future harm. Lyons, 461 U.S. at 108. In Lyons, the plaintiff sought to enjoin the use of police chokeholds because "he feared he would be choked in any future encounter with the police." Id. at 107, n.8. Like in Lyons, plaintiffs' alleged injury is based on their fear that defendants will commit future violations as a result of the indemnification clause. Under Lyons, "[i]t is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." Id. "The reasonableness of [plaintiffs'] fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct." Id.

[24]Plaintiffs have not only failed to establish any previous injury that was traceable to the indemnification provision, but they have also failed to show that defendants' allegedly unlawful

conduct, i.e. the deduction of fees without an adequate explanation for the basis of the fee, will likely recur. The court will not presume that defendants will act unlawfully in the future. See O'Shea, 414 U.S. at 497 (declining to assume that unlawful conduct will occur as a condition to finding a real and immediate threat of harm). Plaintiffs' anticipation of future harm is not "sufficiently real and immediate" to establish an injury that is imminent, as opposed hypothetical. Therefore, plaintiffs cannot show an injury in fact based on the threat of future harm.

Even if plaintiffs could establish imminent harm as a result of the indemnification provision, plaintiffs cannot show that injunctive relief would redress their injury. In order to find that prospective relief would deter such harm, the court must accept the unreasonable premise that the provision's existence somehow encourages defendants to disregard their duties. In the absence of any evidence of defendants' motivation with respect to the indemnification provision, the existence of a deterrent effect is no more than "rank speculation." Therefore, plaintiffs have failed to establish the elements of standing, and defendants are entitled to summary judgment on this claim.

IT IS THEREFORE ORDERED that plaintiffs' motion for summary judgment be, and the same hereby is, GRANTED with respect to the April, June, and January notices. IT IS FURTHER ORDERED that defendants' motions regarding the propriety of the "fair [25]share" fee, and plaintiffs' standing to challenge the indemnification provision, be, and the same hereby are, GRANTED. Defendant CSEA shall return to all plaintiffs who paid "fair share" fees for the 1999 fee-payer year, and who have not yet received an equivalent refund, twenty percent of regular membership dues at the fee-payer's salary

level for the 1999 fee-payer year, with interest.[12] All other relief prayed for in the complaint is denied.

IT IS SO ORDERED.

DATED: May 2, 2001

/s/
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

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[12] See supra, at 19-20 (explaining that this figure is based on CSEA's calculation of the non-chargeable portion of the "fair share" fee under the May notice).

APPENDIX F

UNITED STATES CONSTITUTION
Article III

UNITED STATES CONSTITUTION
Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States . . . .